Dato' Oon Ah Baa @ Boon Pak Leong & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (1)

HIGH COURT (PULAU PINANG) — COMPANIES WINDING UP NO 28–74 OF 2003
KAMALANATHAN RATNAM J
3 DECEMBER 2003

Companies and Corporations — Receivership — Appointment of receiver — Application for appointment of a receiver in company — Guiding principles — Accountability and transparency were allegedly not being practised — Whether appointment should only be done as a last resort for an interim preservation of property

Companies and Corporations — Receivership — Appointment of receiver — Petitioners are not registered shareholders — Allotee — Whether entitled to present winding up petition — Companies Act 1948 [Eng] s 224(1)

The first respondent, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd is a family company incorporated under the Companies Act 1965. The root of the family company is in fact a family business partnership under the vehicle of a company entity, as it was the intention of the founder, to support, maintain and provide for his sons namely the first petitioner, the second petitioner and the second respondent through the family company. The shares held by the family members of the founder are actually held by them respectively as fiduciary trustees for the benefit of the members of the family company. This was the reason the founder did not leave a will, as the family company was a settlement and trust created and left by the founder for his three sons. The petitioners contend that the respondents have committed serious irregularities and fraud in managing the financial affairs of the first respondent. Accountability and transparency were allegedly not being practised and millions of ringgit from customers of the first respondent are being siphoned or misappropriated by the sons of the second respondent into a secret account and such monies were then utilized by the respondents and their family members. The respondents, individually and/or collectively have shown to have acted mala fide by committing oppression on the minority, and misappropriating monies and behaving in such a manner as to act against the interest of the petitioners and their family members. The second to sixth respondents being the majority shareholders are fiduciary trustees of the first respondent and are holding the shares as trustees in their name for the minority shareholders and other beneficiaries of the founder. Four applications were set for hearing which were either to strike out or to stay proceedings. One of the applications, encl 11 was an inter partes application for a stay of the winding up order and also to allow the first respondent a validation order. Since the arguments, whether it is for the application to strike out the petition and the winding up petition, would more or less be the same, the urgent request to hear prayer (3) and the first respondent's need to issue cheques, encl 11 were heard together with the petition. One of the

prayers sought by the petitioners was for the appointment of an interim receiver and manager pending the hearing of the winding up petition. The respondents contended that by filing the winding up petition, the petitioners were in fact trying to destroy the company. The respondents also contended that since the petitioners have claimed that some of their shares are being held by the respondents in trust for them there therefore is a dispute as to the ownership of the shares and that since this is an issue before Court No 1 in 'the suit', the petitioners ought not to be allowed to proceed with this petition.

Held, allowing the appointment of a receiver and manager and dismissing encl 11:

(1) There was no harm or detriment to any party by this court hearing the application at this stage. In fact, if this court was convinced that there was no need to appoint a receiver and manager, this issue becomes resjudicata and the respondents can avail themselves of the said defence. On the other hand, if this court finds for the petitioners on this issue and appoints an interim receiver and manager such an appointment is up to the hearing of the winding up petition. In the meantime the receiver and manager appointed could make all necessary payments and service the bank charges and the banks cannot then freeze the accounts (see para 60).

(2) Before the hearing of the petition, the present petitioners were well within their statutory rights to seek an interlocutory order for the interim preservation of the property which was the subject matter of pending proceedings (see para 67).

(3) The respondents' total refusal to allow any one to look into their accounts and to seek an order for them to preserve and maintain the account would only mean that the respondents are seeking to legitamatize their actions by an order of the court. This court will not lend its hand to the measures adopted by the respondents (see para 76).

(4) For more than 14 months the petitioners have not been paid anything whilst the respondents have had the best out of the family company. It is because of this act of imprudence and vindictiveness on the part of the respondents that the petitioners have been forced to file these winding up proceedings which provide for the immediate protection of the oppressed minority. The appointment of the receiver and manager until the hearing of the winding up petition would enable all parties to receive their just dues as was intended by the founder (see paras 92–93).

(5) An allottee of shares was liable to contribute to the assets of a company in the event of its being wound up even though the allottee's name was not included in the register of members of the company. Accordingly, an allottee who was not a registered shareholder was a contributory for the purposes of s 224(1) of the Companies Act 1948 [Eng] and was therefore entitled to present a winding up petition. In any case the fifth and sixth petitioners are beneficiaries and have been benefiting previously.

At most, even if they are not registered shareholders, they are beneficiaries of their grandfather's intention to benefit them since this is a family company (see para 99).

[**Bahasa Malaysia summary**

Responden pertama, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd adalah sebuah syarikat keluarga yang diperbadankan di bawah Akta Syarikat 1965. Tunjang syarikat keluarga tersebut sebenarnya adalah sebuah perkongsian perniagaan keluarga yang dijalankan di bawah jentera syarikat kerana pengasasnya berniat agar anak-anak lelakinya iaitu pempetisyen pertama, pempetisyen kedua dan responden kedua disara dan dibiaya melalui syarikat keluarga tersebut. Saham-saham yang dipegang oleh anggota-anggota keluarga pengasas sebenarnya dipegang oleh masing-masing sebagai pemegang amanah fidusiari bagi faedah anggota-anggota syarikat keluarga tersebut. Ini merupakan punca pengasas tidak meninggalkan wasiat kerana syarikat keluarga tersebut adalah sebuah pemberian dan amanah yang dibuat dan ditinggalkan oleh pengasas bagi tiga orang anak lelakinya. Pempetisyen-pempetisyen berhujah bahawa responden-responden telah bertindak dalam cara yang menyimpang dari kebiasaan dan melakukan frod dalam menguruskan urusan kewangan responden pertama. Kebertanggungjawapan dan transparensi dikatakan tidak dipraktikkan dan berjuta-juta wang ringgit daripada para pelanggan responden pertama disalurkan atau dilesapkan oleh anak-anak lelaki responden kedua ke dalam akaun rahsia yang kemudiannya digunakan oleh responden-responden dan anggota-anggota keluarga mereka. Responden kedua sehingga responden keenam yang merupakan pemegang saham majoriti adalah pemegang amanah fidusiari bagi responden pertama dan memegang saham-saham sebagai pemegang amanah atas nama mereka bagi pemegang saham minoriti dan benefisiari-benefisiari pengasas yang lain. Empat permohonan telah dijadualkan untuk didengar, sama ada bagi membatalkan atau menggantung prosiding. Salah satu daripada permohonan tersebut iaitu kandungan 11 merupakan permohonan inter partes untuk penggantungan perintah penggulungan dan juga untuk membenarkan responden pertama memperoleh perintah pengesahan. Oleh sebab hujah-hujah sama ada bagi permohonan membatalkan petisyen dan petisyen penggulungan adalah hampir kurang sama, permohonan segera untuk mendengar permohonan (3) serta keperluan responden pertama untuk mengeluarkan cek-cek, kandungan 11 didengar bersama dengan petisyen. Salah satu daripada permohonan pempetisyen-pempetisyen adalah untuk perlantikan penerima interim dan pengurus sementara perbicaraan petisyen penggulungan. Responden-responden berhujah bahawa dengan pemfailan petisyen penggulungan, pempetisyen-pempetisyen sebenarnya cuba memusnahkan syarikat tersebut. Responden-responden turut berhujah bahawa oleh kerana pempetisyen-pempetisyen telah mendakwa bahawa sebahagian daripada saham-saham mereka dipegang oleh responden-responden atas amanah bagi mereka, maka wujud pertikaian mengenai hak milik saham-saham tersebut dan disebabkan ini adalah isu dihadapan Mahkamah 1 dalam 'tindakan', pempetisyen-pempetisyen tidak harus dibenarkan untuk meneruskan petisyen ini.

Diputuskan, membenarkan perlantikan penerima dan pengurus dan mengetepikan kandungan 11 :

(1) Tiada pihak yang akan terjejas sekiranya mahkamah mendengar permohonan pada tahap ini. Malah, sekiranya mahkamah ini yakin bahawa tiada sebab untuk melantik penerima dan pengurus, isu ini akan menjadi res judicata dan responden-responden boleh menggunakannya sebagai pembelaan. Sebaliknya, jika mahkamah ini membuat keputusan yang memihak kepada pempetisyen-pempetisyen atas isu ini dan melantik penerima interim dan pengurus, perlantikan tersebut akan bergantung kepada perbicaraan petisyen penggulungan. Dalam masa itu, penerima dan pengurus yang dilantik boleh membuat segala pembayaran yang perlu dan menservis caj-caj bank dan bank-bank tidak boleh kemudiannya membekukan akaun-akaun tersebut (lihat perenggan 60).

(2) Sebelum perbicaraan petisyen, pempetisyen-pempetisyen mempunyai hak statutori untuk mendapatkan perintah interlokutori untuk pengekalan interim harta yang menjadi hal perkara sementara perjalanan prosiding (lihat perenggan 67).

(3) Keingkaran responden-responden untuk membenarkan sesiapa melihat akaun-akaun mereka dan tindakan memperoleh perintah bagi membolehkan mereka mengekalkan dan menjaga akaun-akaun tersebut bermakna bahawa reponden-responden cuba mengesahkan perbuatan-perbuatan mereka melalui perintah mahkamah. Mahkamah ini tidak akan membantu langkah-langkah yang telah diambil oleh responden-responden (lihat perenggan 76).

(4) Untuk tempoh lebih daripada 14 bulan, pempetisyen-pempetisyen tidak dibayar apa-apa manakala responden-responden telah memperoleh manfaat daripada syarikat keluarga tersebut. Disebabkan tindakan yang kurang bijak dan perasaan dendam responden-responden, pempetisyen-pempetisyen terpaksa memfailkan prosiding penggulungan ini yang memberikan perlindungan serta-merta bagi golongan minoriti yang ditindas. Perlantikan penerima dan pengurus sehingga perbicaraan petisyen penggulungan membolehkan kesemua pihak menerima bahagian masing-masing yang sepatutnya seperti yang telah diniatkan oleh pengasas (lihat perenggan-perenggan 92–93).

(5) Penerima saham bertanggungjawab menyumbang kepada aset-aset syarikat sekiranya syarikat digulung meskipun nama penerima saham tidak termasuk dalam daftar anggota-anggota syarikat. Oleh itu, penerima yang tidak didaftarkan sebagai pemegang saham berdafatr adalah penyumbang bagi tujuan s 224(1) Akta Syarikat 1948 [Eng] dan berhak memasukkan petisyen penggulungan. Dalam apa jua kes, pempetisyen kelima dan keenam adalah benefisiari dan telah menerima manfaat sebelum ini. Meskipun mereka bukan pemegang saham berdaftar, mereka adalah benefisiari mengikut niat datuk mereka untuk mendapat faedah kerana ianya adalah sebuah syarikat keluarga (lihat perenggan 99).

Notes

For cases on appointments of receivers, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 541–552.
For official receivers, see 6 *Halsbury's Laws of Malaysia* paras [110.078]–[110.110].

Cases referred to

Dato' Low Mong Hua (in his personal capacity and as representative of the members of the Eng Bee Family) v Banting Hock Hin Estate Co Sdn Bhd & 8 Ors [2003] 6 AMR 245 (folld)
Elder and others v Elder & Watson Ltd [1952] SC 49 (folld)
Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483 (folld)
Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821 (folld)
JN2 Ltd, Re [1977] 3 All ER 1104 (folld)
Kong Thai Sawmill (Miri) Sdn Bhd, Re;Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227 (folld)
Matang Holdings Bhd & ors v Dato Lee San Choon & Ors [1985] 2 MLJ 406 (folld)
Steane's, Re (Bournemouth), Ltd [1950] 1 All ER 21 (folld)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (distd)
Thomson v Drysdale [1925] SC 311 (folld)

Legislation referred to

Companies Act 1965 ss 181(1)(a), 223
Companies Act 1948 [Eng] ss 224(1), 227
Companies (Winding Up) Rules 1972 rr 23(2), 24, 26, 194(1)
Courts of Judicature Act 1964 s 25 sch 6
Penal Code s 326
Rules of the High Court 1980 O 18 r 19(i)(b), (d)
Supreme Court Act 1981 [Eng] s 37(1)

John Khoo Boo Lai (Ismail, Khoo & Assoc) for the petitioners.
Dato' R Rajasingam (Karin Lim Ai Ching, Lim Hock Siang and Liin Choon Khim with him) (Presgrave & Matthews) for the respondents.

Kamalanathan Ratnam J:

FACTS

[1] Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd is a family company incorporated under the Companies Act 1965 on 14 December 1966 ('the family company'). The approved capital of the family company (first respondent) is RM5,000,000 divided into 5,000 ordinary shares of RM1,000 each. The amount of paid up capital in the family company is RM2,742,000. The objects for which the family company was established are, inter alia, 'to acquire and take over as going concern by purchase or otherwise the undertaking and all or any of the assets and liabilities of Teck Aun Medical

Hall now carried on at Bukit Mertajam, PW'. The root of the family company is in fact a family business partnership under the vehicle of a company entity, as it was the intention of the founder, the late Boon Ng Tong to support, maintain and provide for his sons namely the first petitioner, the second petitioner and the second respondent through this family company. The first petitioner herein was the vice chairman and a director and shareholder in the family company ('the first respondent'). The second petitioner was the managing director and a director and shareholder in the family company. The third petitioner is a director and shareholder in the family company and is the wife of the second petitioner. The fourth petitioner is a beneficiary and shareholder in the family company and is the wife of the first petitioner. The fifth petitioner is a beneficiary in the family company and is the son of the first and fourth petitioners. The sixth petitioner is a beneficiary in the family company and he is the son of the second and third petitioners.

[2] The founder of the first respondent is the patriarch of the family who first started his business as a sole proprietorship in 1936 under the name and style of Teck Aun Medical Hall which has been converted into a private limited company namely the first respondent on 14 December 1966. The founder persevered and built his business and rose from rags to riches. He placed great importance in a family system of management and made and operated the family company as a family trust and as a joint enterprise for the benefit of his family whereby all profits or income of the family company and its wealth and assets was for the joint enjoyment and benefit of the family and also to maintain, provide for and bear all expenses, needs and to provide for the livelihood and support of all of the founder's sons and their immediate families respectively. The main contributors of the family company is the founder, the first petitioner, the second petitioner, the third petitioner and the second respondent who played various roles in the development and success of the family company's business more than 40 years ago when the traditional and famous medicines of the first respondent were invented by the founder and the first petitioner.

[3] The second respondent is the chairman and a director and shareholder in the family company and he is the elder brother of the first and second petitioners. The third, fourth and fifth respondents are directors and shareholders in the family company and the sixth respondent is only a shareholder and they are all the sons of the second respondent.

FINDINGS OF THE COURT

[4] The first to the fourth petitioners hold about 38.96% shares in the family company and the second to the sixth respondents hold about 61.04% shares in the family company. The shares held by the family members of the founder are actually held by them respectively as fiduciary trustees for the benefit of the members of the family company. Individually the shareholding held are as follows:

Name of Shareholder (estimate)	No of Shares	Percentage
Dato' Oon Ah Baa @		
Boon Pak Leong (first petitioner)	486	17.72%
Oon Pek Seng (second petitioner)	540	19.70%
Liew Kim Lam (third petitioner)	12	0.44%
Goh Saw Lan (fourth petitioner)	30	1.10%
Dato' Oon Paik Choo @		
Oon Pai Chow (second respondent)	642	23.41%
Oon Chee Hong (third respondent)	180	6.56%
Oon Chee Loon (fourth respondent)	300	10.94%
Oon Kee Tain (fifth respondent)	180	6.56%
Oon Chon Chai (sixth respondent)	372	13.57%

[5] According to the shareholding, the family of the second respondent is in the majority, ie having 61.04% shares in the family company, whereas the petitioners have 38.96% shares and are in the minority. The petitioners contend that some shares held by the second respondent's sons are shares held in trust for the first petitioner and the second petitioner. If the second respondent's sons returned those shares to the original owners, namely the first petitioner and the second petitioner, then the petitioners would be the majority shareholders. By letters dated 20 June 2002 and 6 July 2002, the first and second petitioners demanded through their solicitors the return of the shares held in trust by the second respondent's sons.

[6] The said shares have not to date been returned. It is also the case of the petitioners that certain shares owned by the third to the sixth respondents are shares belonging to the first and the second petitioners and that those shares are held in trust by the third to the sixth respondents for the petitioners. It is their contention that the family company is a trust, a settlement, a legacy and/or a business partnership, handed down by the Founder to the first petitioner, the second petitioner and the second respondent whereby the wealth and assets of the family company was for the enjoyment, benefit and reasonable use of the immediate family members of the first petitioner, the second petitioner and the second respondent being the sons of the Founder of the family company. The Founder passed away in 1989 and the system set up by him together with the trust, settlement, legacy and/or partnership continues and is being carried on till today. For more than 60 years, the family company operated as a sole-proprietorship and the distribution of assets was determined by the Founder and it had functioned expediently and properly as each family respected and obeyed the system practised by the family company all this while. It is the petitioners' case that if the veil of incorporation of the family company is lifted, then the first respondent is

only a family trust, settlement, legacy or partnership. This was the reason the Founder did not leave a will, as the family company was a settlement and trust created and left by the Founder for his three sons. The Founder had a second wife named Ooi Siew Giek and had two children from her namely Boon Pak Keong and Oon Park Chuan. In 1979, the Founder decided to remove Ooi Siew Giek and her two children out of the support and maintenance system of the trust, settlement, legacy and partnership of the family company. Ooi Siew Giek and her two children when taken out in 1979 were given generous settlements and assets as follows:

(a) a factory;

(b) two semi-detached houses;

(c) 4.5 acres of land;

(d) three shophouses;

(e) cash of RM200,000; and

(f) settlement of her bank overdraft amounting to RM300,000.

[7] This showed that the sons of the Founder would continue to live under the support and dependency of the family company. The petitioners contend that when the Founder was alive, the second respondent was responsible as the chairman, the first petitioner as vice-chairman, the second petitioner as the managing director and the third petitioner as cashier/treasurer. She was also in charge of human resource affairs of the family company. All parties acted out their respective responsibilities and continued so even after the Founder's demise in 1989. All family members of the second and third generation of the Founder acquiesced and accepted the reality of the system inherited by the elders, handed down to them for more than 20 years. All directors and shareholders of the family company acted as fiduciary trustees and were guided by the principles of equity.

Serious irregularities and fraudulent conduct of the respondents

[8] The petitioners contend that the respondents have committed serious irregularities and fraud in managing the financial affairs of the first respondent.

[9] The first respondent collected payment by cash and cheques amounting to about RM500,000 monthly from customers of the first respondent. It is the petitioners' case that monies collected from the family company's customers for products sold by the family company were not paid into the family company's bank accounts but paid into the personal accounts of the fifth respondent or into the account of a firm related to the fifth respondent, and also into the accounts of the other respondents. Payments were also made by customers from Singapore, Indonesia, Thailand and Vietnam. The third respondent and the fifth respondent withheld cash and customers' cheques received as payment to the family company, but had refused to surrender the said cash and cheques. Accountability and transparency were not being practised and millions of ringgit are being siphoned or misappropriated by the

sons of the second respondent with the blessings and and encouragement of the second respondent. The petitioners thus set out instances of misappropriation of the family company's monies by the respondents:

(a) A payment made by the first respondent's customer in the sum of RM8,793.25 was paid by the fifth respondent into his personal account at Malayan Banking Bhd under Account No 010107508229 on 21March 2000. A copy of the pay-in slip showing that the said sum had been paid into the personal account of the fifth respondent was annexed as an exhibit.

(b) A payment by a customer of the first respondent amounting to RM3,642.30 was paid into the fifth respondent's own personal firm known as Kim Way Trading at OCBC Bank under Account No 731-105498-3 on 24 March 2000. A copy of the pay-in slip showing that the said sum was paid into the account of the firm owned by the fifth respondent was exhibited.

(c) A payment made by a customer of the first respondent amounting to RM43,810.20 was paid by the fifth respondent into his personal account at OCBC Bank under Account No 731-102562-2 on 23 March 2000. A copy of the pay-in slip showing that the said sum was paid into the personal account of the fifth respondent was also exhibited. A police report in respect of the above three payments had been lodged and a copy of Bukit Tengah Report No 2700/02 was also exhibited.

(d) Two cheques dated 5 September 2001 and 25 August 2001 for the sum of S$11,265,00 each, paid by the first respondent's customer was issued in the name of the fifth respondent. A police report had been lodged in respect of this and copies of the said cheques and Bukit Tengah Report No 2702/02 were exhibited.

(e) The fifth respondent became bolder and issued a letter dated 20 June 2002 asking the first respondent's customers to make payment for goods purchased by the said customers into his own personal account at OCBC Bank under Account No 508-103819-001. A police report in respect of this had been lodged and a copy of the said letter and its translation and Bukit Tengah Report No 2703/02 have been exhibited.

[10] In reply to the allegations in respect of the sums of RM8,793.25 and RM3,642 the respondents replied by stating that the fifth respondent had gone on business trips to Sabah on 19 March 2000, to Singapore on 26March 2000, to Indonesia on 29 March 2000 and to the Republic of China on 13 April 2000 and had used the said sums and in respect of the sum of RM43,810.20, it was kept as a reserve fund intended for investment activities in the Republic of China but since this was not done the said sums were put back into the first respondent's account. As for the sum of S$11,265 the respondents explained that this sum was deposited into the Singapore account in order to cater for advertisements and investment expenses in the Republic of China. They further alleged that the petitioners knew of this and agreed to this.

[11] It is difficult for this court to merely accept the explanation of the fifth respondent as stated above. Surely, the easiest explanation could have been the exhibition of the audited account which would have reflected how these sums were actually spent. Since the respondents have not denied taking the said sums, they ought to give cogent and acceptable explanations. Merely saying that the sums were spent on business trips to Sabah, Singapore, Indonesia and the Republic of China is not enough. Further, no evidence has been shown that the sum of PM43,810.20 has indeed been put back.

[12] As for S$11,265, the petitioners have denied that they had consented to the respondents spending the same. In any case, the respondents have not explained the petitioners allegation that the fifth respondent had opened an account at OCBC Bank under Account No 508-103819-001 and had asked customers to deposit payments for goods purchased by the said customers into this account.

(f) Payments made by customers of the first respondent from Sarawak and amounting to about RM70,000 and collected by the fifth respondent, on 20 December 2001 by way of cash cheques, and cashed the following day, were not handed over by the fifth respondent to the first respondent and is believed to be paid into the personal account of the fifth respondent. Copies of invoices and receipts issued by the fifth respondent to the said customers in respect of the said payments were exhibited.

(g) A copy of a fixed deposit document for the sum of RM200,000 placed in fixed deposit in the name of the third and fifth respondents was also exhibited.

(h) Evidence in the respondent's own handwriting showing that for a period of less than ten days, ie from 19 December 2001 to 27 December 2001 the fifth respondent had collected monies amounting to RM306,438.52 from customers of the first respondent and that part of the said monies, to a tune of about RM112,122.07 was used directly by the second to the sixth respondent, and their other family members without the consent of the petitioners. A copy of the respondent's handwritten note with translation from Chinese to English were also exhibited.

(i) Further evidence also in the fifth respondent's own handwriting showed that:

(i) monies were collected from customers of the first respondent and used by the respondents and their family members leaving a balance of three cents only;

(ii) from a sum of RM60,000 collected by the fifth respondent from the family company's customers only RM108.20 was handed over to the family company;

(iii) from a sum of RM49,507.92 collected by the fifth respondent from customers of the family company, sum of RM24,816.92 was taken by the respondents and their family members.

[13] Copies of the handwritings of the fifth respondent referred to in (i), (ii) and (iii) together with the translations were exhibited.

(j) In November, 2002 the respondents tried to take out monies from the first respondent's account by giving the excuse that the said sum was actually a refund of monies paid in excess by a customer of the first respondent. The respondents showed a piece of paper written in Chinese handwriting purportedly from a customer of the first respondent requesting for a refund of a sum of RM81,133.80 to be paid to one 'Aun Sun Hong'. The petitioners who knew most of the customers doubted the veracity of the said refund, as so far as the petitioners knew, the family company did not have any customer by the name of 'Aun Sun Hong' and requested the respondents to give further details such as proof of how such excess payment had occurred, when and how such excess payment was made and proof of sales, but the respondents refused to provide any proof or explanation. Instead the respondents showed another letter purportedly from the said 'Aun Sun Hong' saying that he had received a telephone call from one Mr Mok Zuo Yong from Eng Choon Medical Hall in Vietnam who had said that they had purportedly made excess payment to the first respondent and requesting the first respondent to return the excess payment of RM81,133.80 to the said 'Aun Sun Hong' without showing any cogent proof to support such refund. A copy of the first respondent's cheque which the Respondents tried to issue out and the piece of paper with Chinese writing and letter purportedly from the said 'Aun Sun Hong' together with translation, have all been exhibited.

(k) The respondents opened a secret account namely Account No 5-07095-50131331 at Malayan Banking Bhd in the personal name of the respondents and siphoned collections of monies amounting to hundreds of thousands of ringgit from customers of the first respondent into the said secret account and such monies were then utilized by the respondents and their family members. Details of the transactions of the said secret account operated by the respondents and details of secret payments made by the respondents from the said secret account, in the handwriting of Chua Sai Boey (ie the daughter-in-law of the second respondent) were also exhibited.

(l) The second to the sixth respondents have illegally paid in payments made by customers of the family company in the form of cash cheques into Account No 0683067344221 at Public Bank Bhd, Simpang Ampat Branch which is the bank account of a firm by the name of 'Heng Leong Trading' which is not the family company's firm and has no connection whatsoever with the family company. Monies belonging to the family company siphoned by the respondents in this manner amounted to RM396,253.75. A police report has been lodged in respect of this namely No 2062/03.

[14] Replying to the allegation that a sum of RM70,000 was collected by the fifth respondent, the respondents replied that the said sum was distributed as ang pows'.

[15] The petitioners submitted that between August to December 2002 there were a total of 250 transactions and that in respect of these, there have been insufficient explanations from the respondents as to how and why these expenditures were incurred.

[16] The petitioners questioned why the respondents had not stated to whom the RM70,000 had been paid out as 'ang pows'. No records were offered, no vouchers shown and further there was no evidence as to how many employees there were for whom the RM70,000 was distributed. Cik Karin submitted that the sum of RM70,000 had been utilized for 'ang pow' payments and that the accounts had been audited. However she then corrected herself to be on record that the payments had only then been approved by the Board of Directors which conspicuously did not have any representation from any of the petitioners or their families. Another pertinent factor as pointed out by Mr Khoo is that these sums of money were paid out about two months before Chinese New Year. If it is 'ang pows' it must be paid contemporaneous with the Chinese New Year period. Also to be noted is a document exhibited as 'K' in the Petition which is a hand written document of the respondents showing that a sum of RM47,498 which was entered as for Red Package (New Year Ang Pow), has been deleted. In other words, there is no evidence that 'ang pows' were paid out. It is the judgement of this court that surely the petitioners are entitled to have these details. In the absence of cogent explanations, the petitioners contend that these monies have been misappropriated.

[17] However, what is pertinent is that these monies which are alleged to be 'ang pow payments' were utilized two months before the Chinese New Year and it is a fact of life and this court takes judicial notice that 'ang pows' are usually given at the most, a week before Chinese New Year.

[18] In fact, the allegation of the petitioners have not been effectively replied in that the petitioners have shown that the second respondent's daughter-in-law (Chua Sai Boey) had been paid a sum of RM3,188 for her computer and that the second respondent's son, Kee Loong had been paid a sum of RM2,900 for his piano. Further the third respondent's credit card claim for RM15,791 had been paid from the first respondent's account. There was also a sum of RM2,484 spent on Hi-Fi Karaoke set. Further, a sum of RM2,457.87 had been allocated to Chua Sai Boey as living expenses. There was also a sum of RM3,172 spent on 'famous wine & tea' Who drank this wine and tea and for what purposes, have not been explained. All these details can be found from exh N to encl 2, of the petition.

[19] In respect of the sum of RM200,000 held in a fixed deposit account in the name of the third and fifth respondents, the petitioners contend that the third and fifth respondents have not been able to explain the source

from where they acquired the said sum. They said it was a sum given by a friend; but the said friend has not affirmed any affidavit saying that he had indeed given the said sum of RM200,000.

[20] As for the sum of RM306,438.52 which the fifth respondent is alleged to have collected from customers within a spate of ten days, the respondents have given no satisfactory explanation whilst not denying the fact that the sum of RM306,438.52 had been collected.

[21] As for the sum of RM81,133.80 paid as a refund to one 'Aun-Sun Hong' in Vietnam, it is to be noted that the respondents never did adequately refute this. At least, there ought to have been a sufficient acknowledgment of receipt of this sum from the recipient in Vietnam. As for the allegation that the respondents had opened a secret account number 507095-50131331 at Malayan Banking Berhad in the personal name of the respondents and had been siphoning collections of large sums of monies, the respondents did not deny having opened the said secret account. Their answer was (as in encle 27A para 41) that since the petitioners had refused to sign the cheques sent to them by the respondents, the respondents were compelled to utilize the individual account of the respondents to make payment to the respective creditors. But the respondents have failed to address the issue that the reason the petitioners had refused to sign the said cheques was because the respondents had failed to submit the audited accounts as ordered by Court 1 in respect of Penang High Court Civil Suit No 22–380–2002 (the suit) where the present petitioners are the plaintiffs and the present respondents are defendants. The arrogant and defiant attitude of the respondents in refusing to comply with the court's directive and yet insisting on the petitioners complying with their part of the order is so abhorrent to natural justice that equity would have sadly demurred at this unfair attitude of the respondents and would therefore urge this Court to sanction the application of the petitioners. As for the petitioners' allegation that the respondents had opened a secret account number 0683067344221 at Public Bank Berhad in the name of Heng Leong Trading and which is not a company belonging to or affiliated with the first respondent, and into which account the respondents were alleged to have pumped in RM396,253.75, the respondents merely denied the said allegation and contended that 'all transactions incurred by the respondents were in the course of the first respondent company's business activities and were at all times accountable'. If this was a fact why did the respondents not exhibit their accountability. Why did they not show how the sum of RM396,253.75 has been utilized. Or if the same was still in the account, why did they not say so. Their deafening silence is clearly indicative of malpractice by the respondents. They ought to be made to account for this. Directors must realize that they owe a fiduciary duty to shareholders and to other directors and to the beneficiaries too and any misconduct on their part if shown or if suspected as being shown to exist, must be investigated and in cases such as this, the only person who can investigate and discover the machinations of manipulative directors, is the court appointed receiver and manager.

[22] In a desperate attempt to prevent the petitioners from proceeding with this petition and the ancillary applications following therefrom, the respondents argued that since there are disputed facts it is not open to the petitioners to rely on disputed facts until witnesses are brought to trial and therefore they urged that the trial must go on in Court 1. For this, they relied on the Privy Council decision in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 which held that if allegations are made in affidavits by the Petitioner and those allegations are credibly denied by the Respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. In *Tahansan,* the court reached that decision because there were disputed facts. Here firstly the respondents have admitted that this is the modus operandi of both parties to siphon money to deposit into their personal accounts monies received on behalf of the first respondent and in fact to do all things anathema to proper company management and all in the name of 'modus operandi'. If it is true that the petitioners themselves had done this, then two wrongs do not make a right, and the argument of the respondents on this must therefore fail. Further in *Tahansan* , the court talked of disputed facts. In the case before me, the respondents have failed to show with sufficient proof other than mere denials, how the sums, banked into their accounts and not denied by them, have been expended for the benefit of the company. In my opinion, the reasoning in *Tahansan* cannot support the respondents' case by any stretch of the imagination.

[23] It is the petitioners' case that the amounts referred to above are believed to be 'the tip of the iceberg' only. There are many more payments made by the first respondent's customers in Singapore which have been paid into the personal accounts of the fifth respondent or other family members of the second respondent which are believed to involve hundreds of thousands of ringgit collected by the fifth respondent and other family members of the second respondent. It is believed that this is the same situation in the whole of Malaysia including Sabah and Sarawak and in Thailand, in Vietnam and in Indonesia where the second respondent' sons frequently visit 'on business trips'. The issue of the respondents misappropriating monies belonging to the family company erupted and was in the agenda in a Board of Directors meeting of the first respondent held on 11 January 2002. The third respondent and the fifth respondent failed and refused to return cash and cheques belonging to the family company and refused to show their receipt books. The second to fifth respondents , in a Board of Directors meeting held on 8 March 2002, abused their majority status and made a decision that the family company would accept payment by way of cash and 'non-account payee' cheques from customers of the first respondent so that the respondents could continue to collect payments from the customers and pay the same into the personal accounts of the respondents. It has been alleged that until today a lot of customers' cheques have been received by the children of the second respondent and not paid into the account of the first respondent. Copies of the minutes of the meetings held on 11 January 2002 and 8 March

2002 were exhibited. The abuse by family members of the second respondent pertaining to excessive and unreasonable claims also saw the proposal to set up a claims committee during the Board of Directors meeting held on 11 January 2002, but unfortunately the committee could not take off as the dispute among family members continued and the second respondent and his sons refused to accede to the setting up this Committee. The petitioners maintained that this committee should be set up as the second to the sixth respondents were using up the monies of the family company through all sorts of claims. For example, Oon Kee Loong ie the fifth son of the second respondent and younger brother of the third to sixth respondents spent a sum of RM214,553.75 for the year 2001 (ie an average of RM17,879.49 a month). Such excessive expenditure would no doubt bankrupt the family company. The wealth of the family had been used to satisfy the interest of individuals and not the collective interest of all the family members including the petitioners. The understanding and the family ethics pertaining to thrift, and the need to control ones desire not to spend extravagantly were all totally disregarded. A copy of the computation by the first respondent which had been furnished to Oon Kee Loong was also exhibited. The same applied for the second respondent's other children.

Breach of fiduciary duties

[24] When the Founder was alive, the expenditures of the adopted daughters of the second respondent, ie Oon Fu Fung and Oon Ai Fung were not met from the funds belonging to the first respondent. Presently the expenditures of the adopted children of the second respondent are being paid out from the funds belonging to the first respondent and this has caused an outflow of funds from the first respondent. This has caused the inevitable distribution of the family company's wealth and has seen the second respondent's family in general acquiring wealth far more than the two other families namely the families of the first petitioner and the second petitioner. If the principle of distribution according to family is followed, each family branch in general is entitled to one third of the income obtained from the first respondent.

Respondents acting for their own interest

[25] The petitioners and their employees have been assaulted and numerous police reports have been exhibited relating to these assaults. On 26 June 2002, the third petitioner was assaulted by the fourth respondent in the office of the second petitioner. Bukit Tengah Report No 2554/02 in respect of this assault has been exhibited. On 21 June 2002, the fourth respondent announced in the factory of the first respondent that the Police were there to arrest the second petitioner when in actual fact the first respondent was invited by the Royal Malaysian Police to attend a function. The second petitioner had instructed his solicitors to warn the fourth respondent and demanded damages. A copy of the said solicitors' said letter dated 28 June 2002 has been exhibited. The petitioners have felt the continuous humiliation and oppression and abuse of powers and the second petitioner as the managing director found

that the family company is in a state of turbulence and disharmony as a result of the actions of the family members of the second respondent. Therefore the first petitioner and second petitioner instructed their solicitors to send a letter dated 17 June 2002 to the second respondent and to the third to sixth respondents to remind the second respondent and his family members of the background of the family company and the need to preserve the, intention of the Founder, namely that the first respondent was a family trust, settlement, legacy or partnership for the benefit of the three sons of the Founder only. There was no reply to the said letter. On 17 June 2002 the first, second and third petitioners made a requisition for an extraordinary general meeting to, inter alia, confirm the existence of the trust and settlement agreement of the first respondent and to discuss its future. In that said letter the second petitioner, as an elder of the second generation of the family company and as its managing director, advised the fourth respondent not to commit further discrimination pertaining to claims for maintenance of other family members. Further, the fourth respondent was advised not to interfere in matters pertaining to employees which all along was under the management, control and administration of the managing director. The fourth respondent was also advised not to humiliate his aunt, ie the third petitioner and to treat all his cousins well. There was no reply to the said letter which was also exhibited.

[26] The first petitioner demanded for the return of his shares from the fourth, fifth and sixth respondents through his letter dated 20 June 2002. There is no reply to this letter. On 17 June 2002, the second petitioner as the managing director was forced to send a letter to Chua Sai Boey, ie the wife of Oon Kee Loong (a son of the second respondent and brother of the third to sixth respondents) who works as a marketing secretary to advise her that she did not have the authority or right to instruct the employees of the first respondent to report to her as all employees were under the control and management of the second petitioner as the managing director and that she had no authority to demand that the third petitioner do report her family expenses to her (Chua Sai Boey) and that she also could not simply increase her salary as she liked. The said Chua Sai Boey did not even bother to reply to the said letter. As such on 22 June 2002, the second petitioner was forced to send another letter to Chua Sai Boey to inform her that she could not simply employ any employee without the knowledge of the managing director and requested her to explain here actions. There was also no reply to this letter. The salaries of the family members of the second respondent were arbitrarily increased without the consent of the two other families, namely that of the first and second petitioners. As such the second petitioner as the managing director wrote a letter dated 22 June 2002 to the fourth respondent seeking an explanation because at the same time the salaries of family members of the first and second petitioners were not increased. There was no response to this discriminatory action by the second respondent against the family members of the first and second petitioners. The first petitioner's claim for reimbursement in respect of a donation by him for the public welfare as done by him for decades, was ignored. The first petitioner

had donated RM10,000 to the New Era College using his own monies first. A family company cheque was signed to reimburse the first petitioner but the fourth respondent refused to release the said cheque. The children of the second respondent particularly Oon Chee Loon (the fourth respondent) frequently caused disturbances and obstructed family members of the first petitioner and second petitioner who were working in the first respondent from carrying out their duties. On 13 June 2002, the second petitioner as the managing director of the first respondent was forced to issue a general letter authorising Oon Jiun Huah (a son of the first petitioner) and Oon Chuin Tao (the sixth petitioner) to carry out their respective duties in the factory of the first respondent but on 14 June 2002, the fourth respondent who labelled himself as the 'cashier' and 'storekeeper', although knowing that Oon Jiun Huah was the storekeeper, issued instructions to the security guard to search the cars of Oon Jiun Huah and Oon Chuin Tao just to obstruct and embarrass the Petitioners from carrying out their duties. The fourth respondent's action caused the second petitioner as managing director to issue a letter dated 24 June 2002 to the fourth respondent and this has been exhibited. On 16 July 2002, the fourth respondent (Oon Chee Loon) tried to obstruct the sale of goods to a customer of the first respondent which deal the fifth petitioner had successfully concluded. The said customer had made payment by way of telegraphic transfer to the account of the first respondent although prior to this, the fifth respondent had issued a letter dated 20 June 2002 requesting the said customer to make payment into his personal account. The said customer had refused to do so after being informed by the petitioners that such a payment was not valid. As a result of the fourth respondent's action, the second petitioner sent a letter dated 16 July 2002 to the fourth respondent narrating this incident and a copy of the said letter had been exhibited.

[27] As a result of the continuous oppressive actions of the respondents that occurred in various forms and the wide-spread discrimination in payments and salaries towards their families as against the families of the first and second petitioners and due to the misappropriation of monies coupled with the authorities and rights of the petitioners being challenged by family members of the second respondent, the first, second and third petitioners as 'authorized signatories to the bank accounts of the first respondent and as principal guarantors in respect of all banking facilities were forced to instruct the banks to freeze the accounts of the first respondent. Once this was done, the second to the sixth respondents began to fill the first respondent with family members of the respondents by removing the petitioners from the administration of the first respondent.

[28] The second to the sixth respondents became bolder and behaved violently. The children of the second respondent attacked and beat up and injured the petitioners with parangs, iron pipes and chains.

[29] On 16 July 2002 when the second, third, fifth and sixth petitioners and Oon Jiun Huah (a son of the first petitioner) were in the factory of the family company to carry out their respective duties, the fourth respondent and Oon

Kee Loong (fifth son of the second respondent) switched-off the electricity supply of the factory and ordered the employees who were working overtime to go home. Then the fourth respondent and Oon Kee Loong together with the third and fifth respondents and Oon Chee Kheng (sixth son of the second respondent) locked the factory gate and refused to allow the second, third, fifth and sixth petitioners and Oon Jiun Huah (first petitioner's son) to leave the factory and insisted on searching the second petitioner's car. The second respondent's children only allowed the petitioners to leave after the police were called and the respondents were advised by the police to stop their illegal act. The conduct of the second respondent's children by illegally detaining the second, third, fifth and sixth petitioners and Oon Jiun Huah (first petitioner's son) would constitute an offence under the law, and a police report was lodged in respect of the said incident. Photographs were taken of the said incident and copies of the said photographs have been exhibited.

[30] On 29 July 2002 at about 12.20 in the afternoon, the respondents again behaved aggressively and locked the petitioners in the new factory and on the same day at about 4pm the respondents went to the old factory of the first respondent to cut the locks and padlocks. A police report pertaining to the respondents locking the petitioners in the new factory had been lodged and has been exhibited.

[31] On 30 July 2002, the respondents went to the old factory of the first respondent and took away medicines under the care and control of the first petitioner as the holder of the license issued by the authorities for the processing and manufacturing of Chinese traditional medicines of the first respondent without first getting the approval/consent of the first petitioner and without taking any heed of the responsibility and position or the presence of the first petitioner or consulting the first petitioner at all and the respondents also damaged the alarm system and the closed circuit camera and also disconnected the telephone line. The respondents also attacked the first petitioner's children. Police reports of the incident had been lodged and exhibited.

[32] On 28 August 2002, the respondents broke the locks to the offices of the fifth petitioner and Oon Jiun Huah (first petitioner's son) and changed the locks to the said offices and thereafter the respondents locked the said offices and refused to allow the fifth petitioner and Oon Jiun Huah to enter their offices to carry out their respective duties. Until today the fifth petitioner and Oon Jiun Huah have been unable to enter their respective offices. Police reports of the said incident have been lodged and exhibited.

[33] On 29 August 2002, again the respondents accompanied by their other family members including the second respondent's wife acted violently and attacked the petitioners in the old factory. The respondents without taking any heed of the responsibility and position or the presence of the first petitioner as the license holder for processing and manufacturing Chinese traditional medicines for the first respondent removed and took away all materials and medicines under the care and control of the first petitioner

without first consulting, discussing or obtaining the approval/consent of the first petitioner. The conduct of the respondents was to completely remove the petitioners from all form of participation in the first respondent without any regard or consideration whatsoever of the rights and interests of the petitioners in the first respondent. Five police reports of the said incident have been lodged and exhibited. Photographs were taken of the incident and copies of the said photographs have also been exhibited.

[34] On 12 September 2002, the respondents used a fork lift to prise open and thus damaged three layers of the door in the old factory and abused and threatened the and fourth petitioners. A police report of the said incident had been lodged and exhibited.

[35] On 19 September 2002 at about 11.55 in the morning, the second respondent's son, one, Oon Chee Kheng attacked the third pthird petitioner. A police report of the said incident had been lodged and exhibited.

[36] On 19 September 2002 at about 8.30 in the evening, the second respondent' son, one Oon Kee Leong behaved aggressively towards the third petitioner and attacked the second petitioner. A police report of the said incident had been lodged and exhibited.

[37] On 7 November 2002, the petitioners went to their office in the factory of the first respondent and the respondents especially the fourth respondent behaved aggressively and issued threats and attacked the third petitioner. The fourth respondent also kicked the fourth petitioner's chair and nearly caused her to fall. A police report of the said incident had been lodged and exhibited.

[38] On 8 November 2002, the respondents locked the factory gates and refused to allow the petitioners to enter the factory. The respondents also abused and threatened the petitioners. A police report of the said incident had been lodged and exhibited. Photographs showing the respondents abusing and threatening the petitioners and the factory gates being locked with padlocks have been exhibited.

[39] On 12 November 2002, the respondents particularly the fourth respondent and two of his brothers, ie Oon Chee Kheng and Oon Kee Loong (second respondent's sons) attacked the petitioners with chains, parangs, iron pipes etc and caused serious injuries to the personal assistant to the petitioners who had to be admitted to the hospital for surgery. Six police reports of the said incident have been lodged and exhibited. Photographs showing the injuries suffered by the victims taken while in hospital have been exhibited and the medical report of the injuries sustained has also been exhibited. In relation to this the fourth respondent together with Oon Chee Kheng and Oon Kee Loong, ie the two other sons of the second respondent have been charged in the Butterworth Sessions Court under s 326 of the Penal Code on 26 May 2003.

[40] On 13 November 2002, ie a day after the second respondent's sons attacked the petitioners and caused serious injuries, Oon Chee Kheng (a son of the second respondent) issued threats to the first petitioner that he would take revenge against the first petitioner's sons if his brothers (second respondent's sons) were arrested by the police. A police report in respect of the threat by the said Oon Chee Kheng had been lodged and exhibited.

[41] On 14 November 2002, the fifth respondent issued a threat that he knew a lot of Thai people and needed to only pay RM5,000 to 'settle' the fifth petitioner and his brother. A police report pertaining to the fifth respondent's threat had been lodged and exhibited.

Breach of trust

[42] All directors and shareholders of the first respondent in actual fact are fiduciary trustees whereby each director and shareholder is holding assets of the first respondent equally and for each other, of the Founder's family. All family members worked hard with the common intention of making a success of the family company and each family member played his respective role in the development of the business founded by the Founder. As such it is clear that all members have one aim which is to see the success of the first respondent. However when shares were allotted, they were allotted without taking into account the numerical number of the shares. Therefore the second to the sixth respondents who are now the majority shareholders have oppressed the petitioners who are the minority shareholders, by exploiting the technical numerical superiority and forming the majority, when in fact the majority holding does not mean anything and all shareholders are aware that the first respondent is for the benefit of all the Founder's sons, equally. The second respondent, the first petitioner and the second petitioner all worked hard for the family company led by the Founder and took low salaries and in return the Founder provided for and took care of the expenses, needs, maintenance, livelihood and all reasonable luxuries of the Founder' s sons and their immediate families. The third petitioner worked for the Founder since she was 21 years of age that is since 1968. Because of her loyalty and contribution, the third petitioner was given a special position namely as the cashier/treasurer of the first respondent which the third petitioner held for more than 30 years until she was removed by the second respondent in a Board of Directors Meeting on 8 March 2002 without any notice and by way of a letter dated 2 May 2002. It is a historical fact that the sons and grandchildren of the Founder are supported by the income derived from the first respondent and they enjoy all basic needs and also the reasonable luxuries provided for, from the assets of the first respondent. Cars, tuition fees, food, university fees, clothings etc are provided for, through the income of the first respondent. The wealth and benefits of the first respondent are inherited and enjoyed by the sons of the Founder and this was the original intention of the Founder which had been accepted by the Founder's sons. The petitioners have laboured all this while to achieve a common intention whereby all the three sons are fiduciary trustees of the

first respondent for the benefit of each other and their respective families. All major traditional medicines were concocted/formulated by the Founder and the first petitioner. As such for years the second respondent, the first petitioner, second petitioner and third petitioner have acted as guarantors for the banking facilities provided for the first respondent till to date. When the Founder passed away in 1989, he did not leave a will as all the inheritance of his sons was in place in the form of the first respondent's assets.

[43] It is clear that the respondents have been shown to have misappropriated funds belonging to the first respondent and there have been shown to this court/ instances of oppression of the minority shareholders. The second to sixth respondents have not shown to be practising transparency and accountability in respect of the affairs of the first respondent, especially in respect of monies and assets belonging to the first respondent.

[44] The respondents, individually and/or collectively have shown to have acted mala fide by committing oppression on the minority, and misappropriating monies and behaving in such a manner as to act against the interest of the petitioners and their family members. The second to sixth respondents being the majority shareholders are fiduciary trustees of the first respondent and are holding the shares as trustees in their name for the minority shareholders and other beneficiaries of the Founder.

[45] Sometime around March 2001, the Board of Directors of the first respondent had a meeting with JB Lau & Associates, a firm of Public Accountants, to determine the major positions held by the respective family members in order to fix reasonable salaries to curtail the abuse of claims for expenditures and thereby depleting the wealth of the first respondent. To avoid any competition from any family member by making all kinds of unreasonable claims, a fair system for the distribution of wealth and claims for reasonable expenditures to family members needed to be structured. The Board of Directors of the first respondent therefore on 8 March 2002 proposed that a re-structuring of the business of the first respondent be made but the family of the second respondent deferred the said agenda although they had agreed to it prior to the meeting. The family members of the second respondent changed their minds as they intended to use their majority status in the first respondent to possess all the wealth of the first respondent for themselves. A copy of the proposal by JB Lau & Associates dated 27 March 2001 has also been exhibited. The second respondent and his children who hold majority votes in the Board of Directors on 8 March 2002 after holding a meeting, removed the third petitionerthird petitioner who held the position of cashier/treasurer and appointed the fourth respondent as the new cashier without giving any notice whatsoever. The removal of the third petitioner was recorded by a letter dated 2 May 2002 signed by the third respondent who called himself the assistant managing director. The third petitioner had held the position of cashier for 30 years. The third petitioner was removed because she was constantly checking thoroughly the accounts of the monies of the first respondent and she was also checking to find out how much monies the second respondent and his family members had collected from

customers of the first respondent and how much they had paid into their personal accounts. With the removal of the third petitioner as cashier/ treasurer in the first respondent and the appointment of the respondent as the new cashier, the way was clear for the respondents to continue committing misappropriation such as paying-in collections of payment from customers into their personal accounts and making excessive and unreasonable claims. The second to sixth respondents have exploited their position and have maintained that they are the majority shareholders and that they could remove the first petitioner, the second petitioner and the third petitioner and, all family members of the petitioners from all positions.

Particulars of oppressions

(a) The family of the second respondent without any notice, at a Board of Directors meeting on 8 March 2002, removed the third petitioner as cashier/treasurer which is against the basis of the fiduciary trust created by the Founder whereby any decisions made, must be with the consent of the families. The position held by the third petitioner was created for the benefit of the third petitioner by the Founder for her contribution and sacrifices and the third petitioner had been receiving very low salaries for decades. As such the third petitioner has a right to make a claim for further beneficial rights and equitable interest in the assets and wealth of the first respondent. Besides the removal of the third petitioner from her position has to be looked into.

(b) With the third petitioner removed, the respondents misappropriated the wealth and assets of the first respondent as enumerated earlier.

(c) The petitioners made a requisition for an extraordinary general meeting (EGM) on 17 June 2002 and the secretary of the first respondent sent a notice dated 25 June 2002 for a Board of Directors meeting to be held on 9 July 2002 to fix a date for the EGM to discuss the specific agendas requested by the petitioners. On the morning of 9 July 2002, the Board of Directors meeting held to fix a date for the EGM was converted into an 'Emergency Board of Directors Meeting' without notice to the first, second and third petitioners. The notice of 'Emergency Board of Directors Meeting' dated 8 July 2002 was never sent by the secretary to the first respondent and was only shown to the petitioners at the last minute. Moreover the notice of 'Emergency Board of Directors Meeting' dated 8 July 2002 stated that the said meeting would only be held on 10 July 2002. In addition the third respondent and the fifth respondent showed a letter dated 8 July 2002 containing items not stated in the original agenda for the Board of Directors meeting on 9July 2002 called for by the secretary by way of the secretary's notice dated 25 June 2002. The first, second and third petitioners objected that the two fresh notices given at the last minute were never sent by the secretary and were therefore ultra vires the memorandum and articles of the company. The original agendas and the original intention for the Board of Directors meeting were disregarded completely and

not carried out. The first, second and third petitioners were caught by surprise as the new item was to remove the second petitioner as managing director and,to change the mandate to operate the accounts. The system that existed all this while in order to prevent any abuse of the accounts, needed the signatures of two families, ie 'Signatory A' to be from two members of the second respondent's family and 'Signatory B' to be from two members of the first/second petitioners' family to operate the accounts of the family company jointly. The surprise agenda of 9 July 2002 was to change the operation of the accounts from two family branches to one family only, ie the family of the second respondent. The new notice and letter containing the surprise agenda which was only shown by the second respondent and his children before the start of the meeting on 9 July 2002 has also been exhibited.

[46] As the first, second and third petitioners did not wish to be a party to the improper agenda to remove them, they left the meeting and immediately through their solicitors sent a letter to the secretary on the same day informing him that the Emergency Board of Directors Meeting held without any notice to them was irregular and that all business transacted at that meeting by the family of the second respondent was invalid. The three petitioners also sent a similar letter to the second to fifth respondents objecting to the abuse of power and to the oppressive conduct.

[47] For the purposes of the present application, this court is satisfied that the petitioners have shown sufficient grounds of oppressive conduct on the part of the respondents.

[48] The actions and conduct of the second respondent and his children are clear. They intend to remove the petitioners and the family members of the petitioners from the administration and management of the first respondent and to monopolise the operation of accounts of the first respondent. Without the presence of the family members of the first and second petitioners, the second respondent's family can manipulate or siphon out monies belonging to the first respondent which is a trust or a settlement. It is necessary that the wealth, assets and monies of the first respondent be preserved/protected and that the second respondent to the sixth respondent must be restrained from operating any account without the permission, consent and knowledge of the petitioners or beneficiaries of the first and second petitioners' families as all wealth, assets and monies of the first respondent are trust monies and therefore trust assets. The petitioners have shown that the second respondent and his children are capable of committing conversion and fraud in respect of the wealth and assets of the family company. Currently, only the second to the sixth respondents and the family members of the respondents are controlling all positions in the family company namely in the management division, finance division, production division, marketing division and money collection division. This has put the first respondent's finances in jeopardy and without a check and balance, the first respondent is easily exposed to wide-spread abuses and liabilities. The oppression and suppression and also abuses and fraud committed by the second to the sixth respondents

individually or collectively against the petitioners and family members of the petitioners are obvious and are continuing. The petitioners contend that there are many more false claims for expenditure, which have yet to be traced. Based on the existing conduct of the second to the sixth respondents, it would seem that their fears are well-founded.

[49] Enclosure 11 was the first application to come up before me. This was an ex parte application by the respondents to stay all proceedings including advertisement and gazetting in respect of the petitioners' application to wind up the first respondent. The second prayer was to allow the first respondent to trade in its ordinary course of business and that no disposition of the property of the first respondent or payment made from 17 June 2003 or to be made thereafter into or out of the first respondent's bank accounts should be avoided by virtue of s 223 of the Companies Act 1965 pending the determination of the respondent's application to strike out or stay the winding up petition. Since there was already a winding up petition filed, this court was of the view that an ex parte approach taken by the respondents was improper. The court therefore directed the matter to proceed inter parties. As to what transpired in respect of encl 11, I have given a written judgment dated 23 July 2002 against which order the respondents have appealed although I was at a loss as to why they were appealing since I had given parties an opportunity to re-argue encl 11 since the petitioners had not filed any affidavit-in-reply.

[50] When the matter next came up on 30 July 2003, Dato' Rajasingam for the respondents asked that two cheques issued by the respondents be counter-signed by the petitioners and be passed for payment as these cheques were payments due to the Income Tax Department.

[51] Mr Khoo for the petitioners objected on the basis that his client, the first petitioner had been removed as the Vice Chairman of the first respondent. After hearing arguments, I directed that the said two cheques being payment towards income tax be made good for payment and further directed parties to draw up a draft order accordingly for this court's approval.

[52] On 2 September 2003, there were four enclosures for hearing, namely encll 10, 11, 14 and 28. Enclosure 10 was the respondent's application to strike out the petition to wind up under O 18 r 19(i)(b) and/or (d) of the Rules of the High Court 1980 ('the RHC') and also for a stay of all proceedings. Enclosure 11 was the inter partes application for a stay of the winding up order and also to allow the first respondent a validation order. Enclosure 14 was another application for stay of proceedings pending the hearing of the appeal to the Court of Appeal against my earlier order in respect of Enclosure 11 which subsequently the respondents admitted they had mistakenly taken as a final order. Enclosure 28 was another application of the respondents to also strike out the petition also under O18 r 19(i)(b) and/or (d) of the RHC. Looking at the four applications set for hearing it was obvious that all four were either to strike out or to stay proceedings.

[53] Mr Khoo on the other hand pressed on with his request to hear prayers (3), (8), (10) and (11) of the petition first, which read as follows:

(3) that an order be granted for KPMG Corporate Services Sdn Bhd (Company No 462265-P) a firm of chartered accountants (hereinafter called 'KPMG') and particularly Mr Can Ah Tee and Mr Ooi Woon Chee from KPMG to be appointed as receivers to save, protect and preserve the assets and records of the financial affairs of the family company, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd (Company No 6884-T) until the determination/ of this petition.

(8) that an order be granted for the families of the first petitioner and the second petitioner to be given access and liberty to enter/leave the premises/factory of the family company, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd (Company No 6884-T) and to the respective offices of the Petitioners in the said premise/factory without any obstruction from the respondents to assist the receiver until the determination of this petition.

(10) that an order be granted for the family company, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd (Company No 6884-T) to pay the family of the first petitioner a sum of RM50,000 each per month every month as expense monies to maintain the respective family of the first petitioner and the second petitioner until the determination of this petition.

(11) that an order be granted for the family company, Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd (Company No 6884-T) to settle all arrears of payments to the family of the second petitioner in the sum of RM50,000 per month starting from the month of July 2002 forthwith.

[54] Having read the petition and the four applications and the affidavits in respect of the said applications and considering the urgency of the matter and the fact that documentary evidence had been exhibited to show that there was an urgent need indeed to hear arguments in respect of prayer (3) and upon the respondents' solicitors urging me to hear the second prayer to encl 11 namely the application for a validation order, I drew Dato' Rajasingam's attention to the fact that the petitioners were earlier willing to agree to granting the validation order upon Dato' Rajasingam's suggestion that a monthly sum of RM30,000 be paid to the first and second petitioners' families instead of the RM50,000 that they had asked for and that I had indeed adjourned the case to record such a settlement. However Dato' Rajasingam had informed the court that his clients were unable to pay the sum of RM30,000. Since Dato' Rajasingam did not give reasons why his clients were unable to pay the sum of RM30,000, I saw no urgency in hearing the application for the validation order. Instead I saw the urgent need to see if a receiver and manager ought to be appointed pending the hearing of the winding up petition. Because of the seriousness of the allegations made against the majority shareholders namely the respondents, and since I was of the opinion that whether I hear the application to strike out the petition, or I hear the winding up petition, the arguments offered would more or less be the same, I was of the view that I should hear the urgent request to hear prayer (3) and other related prayers of the petition which again would bring out almost the same arguments from both sides as they would raise in an application to

strike out, or in the winding up petition itself. However because the first respondent needed to issue cheques, I decided to hear encl 11 in any case.

Enclosure 11

[55] There were three prayers in encl 11 which read as follows:

(1) An order that all actions and proceedings in the above winding up petition, including advertisement and gazetting of the above winding up petition pursuant to r 24 of the Winding Up Rules 1972 be stayed pending the determination of the respondent's application to strike out the above petition pursuant to O 18 r 19(b) and/or (d) of the Rules of the High Court 1980 and/or under the inherent jurisdiction, of the court and/or an order for a permanent stay of the above winding up Petition under the inherent jurisdiction of the court;

(2) An order that the first respondent is allowed to trade in its ordinary course of business and no disposition of the property of the first respondent or payment made from 17 June 2003 or to be made thereafter either into or out of the respondent's bank accounts or by cash into or out of the respondent shall be avoided by virtue of s 223 of the Companies Act 1965, pending the determination of the petition or the determination of the respondent's application to strike out or for a permanent stay of the above winding up petition whichever is the latter;

(3) Costs.

[56] Ms Karin Lim for the respondents decided to abandon prayer (1) on the ground of redundancy and pressed on with prayers (2) and (3).

[57] The respondents argued that they needed to operate the first respondent's bank account and to make payments such as the monthly income tax which the first respondent had to pay till 2004.

[58] The respondents also needed to service the bank loans and to pay the salaries, make EPF and Socso payments, electricity and water bill payments, pending the outcome of the winding up petition. The respondents pointed out the urgency of the matter since the banking facilities have been frozen following the presentation of the winding up petition. The respondents argued that the winding up petition was filed with the intention of putting pressure on the respondents and to render ineffective any orders which the Penang High Court No 1 may have made in respect of the suit.

[59] The respondents submitted that in the suit the court had granted an interim order that the signing of the cheques by the first respondent be maintained pending the hearing of the respective enclosures in that suit and one of that application was for a stay pending reference to arbitration and another of which was a prayer by the present petitioners who were the plaintiffs in the suit, for the appointment of receivers and managers. The respondents argued that by having initially filed a suit to seek for almost similar remedies against the present respondents who are defendants in the

suit, the present petitioners have made an election and should be estopped from proceeding with this winding up petition.

[60] In respect of this, I find that whilst in the suit the court may have made such an order, the petitioners did not counter-sign the cheques because the respondents had stopped making payments due to the petitioners. The respondents have a right to file contempt proceedings against the petitioners if the petitioners have not complied with the court's directions. In any case this court has not been shown or referred to the said order even if it is exhibited in the volumes of affidavits filed by both parties. As for the argument that the petitioners have been estopped by election I reject this submission. The machinery in a civil suit moves painstakingly slowly. In the meantime the petitioners themselves are totally left without income and subsistence. The mode of seeking similar redress by a winding up petition is faster and parties will get justice speedily. Besides one of the prayers sought in the suit was also a prayer to appoint receivers and managers. I see no harm or detriment to any party by this court hearing this application at this stage. In fact if this court is convinced that there is no need to appoint a receiver and manager, this issue becomes *res judicata* and the respondents can avail themselves of the said defence. On the other hand, if this court finds for the Petitioners on this issue and appoints an interim receiver and manager such an appointment is up to the hearing of the winding up petition. In the meantime, the receiver and manager appointed could make all necessary payments and service the bank charges and the banks cannot then freeze the accounts.

[61] When Ms Karin submitted that by filing the winding up petition, the petitioners were in fact trying to destroy the company, this court asked her, whether, in the light of such a submission, it was not prudent to appoint an interim receiver and manager. She then submitted that appointment of a receiver and manager should be as a last resort and that too in clear cut cases. Whilst arguing in respect of encl 11 it is obvious that both parties canvassed both encl 11 and the petitioners' application under prayer (3) that is for the appointment of an interim receiver and manager until the hearing and disposal of this petition at the same time. I say this because both parties cited cases in respect of both applications interchangeably.

[62] Incidentally it is appropriate for me at this stage to dispose of a preliminary issue raised by Ms Karin. She argued that the petitioners could not make an oral application for the appointment of an interim receiver and manager. She argued that there must be a separate application for this.

[63] In prayer (3) of the petition, the petitioners have specifically asked for the appointment of two specific persons who have consented to being appointed as receivers to save, protect and preserve the assets and records of the financial affairs of the first respondent until the determination *of this petition* (emphasis provided). The affidavits filed have all been responded to by the respondents. There is no point duplicating and re-filing a separate application

merely seeking the same order. In fact such an action would have been deprecated by this court for prolixity and for waste of time.

[64] As for the respondents' argument that a receiver and manager ought only to be appointed as a last resort, I do not agree. In fact s 25 of the Courts of Judicature Act 1964 deals with the powers of the High Court and provides as follows:

> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[65] Clause 6 of the Schedule gives the court the power to provide for the interim preservation of property the subject matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens or in any other manner whatsoever.

[66] In contrast the jurisdiction of the English courts are governed by s 37(1) of the Supreme Court Act 1981 which states that the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so.

[67] It is apparent therefore that the powers given to the English courts are wide. They may authorise a court appointment in all cases where it appears to the court to be just and convenient to do so. Whereas in Malaysia, the power given is only for the interim preservation of property. Therefore before the hearing of the petition, the present petitioners are well within their statutory rights to seek an interlocutory order for the interim preservation of the property which is the subject matter of pending proceedings, whereas the English Court may make an appointment by way of either an interlocutory or a final order.

[68] In *Matang Holdings Bhd* & Ors *v Dato Lee San Choon & Ors* [1985] 2 MLJ 406, the court held that before appointing a receiver and manager, the court must be satisfied:

(a) that there is a good prima facie claim of title by the plaintiff;

(b) that the property is in jeopardy;

(c) that the applicant would be in a worse situation if the appointment of a receiver is delayed. This normally happens when there is deadlock or mismanagement. These principles clearly apply to the case before me.

[69] As I had said earlier both parties were addressing me on both issues namely encl 11 by the respondents and prayer 3 by the petitioners. This is evident when I refer to the case of *Re Steane's (Bournemouth), Ltd* [1950] 1 All ER 21 relied on by the respondents. This was a case that rested on s 227 of the Companies Act 1948. It held that in a winding up petition, any disposition of the property of the company made after the commencement of the winding up shall, unless the court otherwise orders, be void. The court however held that since s 227 did not indicate any particular principle which should govern the exercise of the court's discretion, it must be presumed that in exercising its discretion the court must decide what would be just and fair in the circumstances of each case having special regard to the question of good faith and honest intention of the persons concerned. To my mind this is exactly the law relating to discretion that this court must apply in seeing if the interim application of the respondents ought to succeed. The question therefore arises whether the validation order sought by the Respondents ought to be allowed by this court.

[70] To my mind this application for validation has to be looked into to see if the respondents who now are the majority shareholders have been acting in all honesty and in good faith. When shown the numerous improper and illegal transmissions of funds due to the first respondent but banked into secret accounts operated by the second to the sixth respondents, Ms Karin's answer was that when the petitioners were in power they were doing the same, namely that the modus operandi was the same. Whilst the petitioners have denied such misconduct, it must be remembered that if indeed the petitioners before their removal were resorting to the same illegal transactions, then it was necessary and imperative for the respondents to have themselves when they were in the minority, to have taken the same action that the petitioners are presently doing. It does not behove the respondents to claim that two wrongs will make a right. I take this submission as a concession by the respondents that they are indeed guilty of the charges of misappropriation and of siphoning of funds due to the first respondent and into they own pockets. On this clear admission of dishonesty it is appropriate that this court appoints an interim receiver and manager to protect and preserve the property until the hearing and determination of the winding up petition.

[71] As for the validation order, since the first and third petitioners have been removed from the position as the Vice Chairman and Treasurer respectively of the first respondent after holding the said positions for decades, and the respondents suddenly increasing their own emoluments with a new and highly inflated salary structure whereas the petitioners and their families remained without any increase and with bonuses allotted to the respondents and whereas the petitioners were never treated to the same luxury and with the respondents' insurance premiums being paid together with the solicitors fees for this case and with their motorcar repair bills being paid out of the first respondent together with the respondents' car instalments whereas the petitioners have received notice that since their car instalments had not been paid as was previously done, their cars are to be repossessed with the

respondents' personal hand phone bills and overseas expenditures being paid out of the funds of the first respondent, with such inequitable distribution of the first respondent's assets in favour of the respondents, it is my judgment that it is most important that a receiver and manager be immediately appointed.

[72] During the course of Ms Karin's submission in respect of encl 11, Dato' Rajasingam suddenly stood up and addressed the court and it is necessary that I reproduce his words verbatim. He said:

> I urge the court to allow the day to day trading by the respondents on terms and conditions to be imposed by the honourable court however stringent they may be.

[73] I took this submission as an attempt by the respondents to allow the court to make fair proposals so that encl 11 could be amicably resolved. For this purpose and as it was already 4.10 in the evening, I directed both parties to agree on terms so that the court could record agreement on encl 11.

[74] By consent of parties I adjourned court to the afternoon of the day after. However when court resumed, Mr Khoo for the petitioners informed the court that he had received an offer letter from the respondents' solicitors which said as follows:

> that all monies be banked into a single account to be operated by the Respondents and an account be handed to the court each and every month until final disposal of all matters and that there be no transaction.

[75] In expressing his clients' utter disappointment Mr Khoo submitted that the respondents intended to perpetuate their fraud. The petitioners thus rejected this proposal.

[76] To my mind this is the second time that the respondents' lead counsel had made concessions only to come up with an about-turn immediately thereafter. The insincerity of the respondents is clearly manifested by their refusing to honour their word given to their lead counsel, for Dato' Rajasingam, a very senior practitioner would not have made such a concession without his clients' consent. To back-track on their promise and to put their lead counsel in an embarrassing position clearly meant that the respondents are bent on handling the finances of the first respondent on their own. This vacillating and oscillating conduct of the respondents by using their lead counsel as a puppet to make and break promises is so abhorrent to proper ethics that the respondents as directors of a company must be made to realise that they cannot get away with such conduct. At least if they had indicated their willingness to allow a representative of the petitioners to sit in when the accounts were being prepared, it would have been something. But this total refusal to allow any one to look into their accounts and to seek an order for them to preserve and maintain the account would only mean that the respondents are seeking to legitamatize their actions by an order of the court. This court will not lend its hand to the measures adopted by the respondents, I therefore dismissed encl 11 with costs.

Prayer 3 of the petitioners

[77] The reason the petitioners are seeking this order is to preserve and protect the assets of the first respondent until the hearing of the winding up petition. In the course of the submission, Mr Khoo asked for order in terms of not only prayer 3, but also prayers (8), (10) & (11) which I have set out earlier in this judgment.

[78] In one of their affidavits in support of the application (encl 56) the first petitioner averred that a big portion of the so called monthly expenses of the first respondent was in fact for the benefit of the second to the sixth respondents and their family members in the form of inflated salaries, overtime claims, insurance premiums, lawyers fees, road tax, insurance, car instalment payments, upkeep of vehicles used by the respondents and their families, personal mobile phone charges of the respondents and other expenses. He averred that not a single cent has been given for the benefit of the petitioners and their families. He further averred, and this has not been denied, that the petitioners have not been paid a single cent for more than a year whilst the second to the sixth respondents lavished themselves with the first respondent's wealth. In support the first petitioner exhibited the second half payroll summary sheet which unwittingly was exhibited by the respondents themselves in their own affidavit. This showed that the second respondent had increased his salary to RM9,000, the third respondent to RM7,000, the fourth respondent to RM6,000, the fifth respondent to RM7,000 and the sixth respondent to RM4,000. A copy of the general ledger of the first respondent showed bonuses and overtime paid to the second to the sixth respondents and to their family members. No payment has been reflected to any of the petitioners or to their family members. The same ledger showed insurance premiums of the third, fourth and fifth respondents amounting to RM2,082 being paid. Again the same ledger reflects a total sum of RM57,529.23 being paid to Presgrave & Matthews and Rajasingam & Co being the legal firms representing the respondents in this case. Again the ledger reflects payment of a sum of RM18,156.79 being road tax and insurance payments for all of the respondents and their family members' cars. The petitioners or their families have not been included in any of these payments. Further a sum of RM16,548.77 has been shown to have been spent for the upkeep of the respondents' and their family members' motor cars. The same ledger shows that various sums amounting to RM16,609.71, RM11,186, RM13,419 and RM14,504 have been paid to Public Finance Bhd as payment for car instalments for the respondents' cars. Further, the respondents' and their family members' mobile telephone bills have been shown to have been paid for from the first respondent's funds as exhibited in the ledger. The ledger also showed that a sum of RM3,800 had been spent as overseas expenses by the fifth respondent.

[79] In response to this, Ms Karin submitted that since this was the mode of practice by all parties, the petitioners ought not to now cry foul. Further it was the argument of the respondents that since these issues were earlier raised in the suit and since the learned judge in Court No 1 had ordered the

first defendant to give an audited account from April 2002 to 31 October 2002 within one month and the interim order of the court was to be maintained, the petitioners ought to be prevented from raising these issues in a winding up petition. As I had pointed out earlier, the interim order of Court 1 in 'the suit' has not been shown to this court, In encl 55 which is the third respondent's affidavit in which he annexed the notes of evidence, unfortunately he neither averred that he had complied with the court's order by auditing the accounts and forwarding it to the petitioners within one month, nor did he extend the said audited accounts as exhibits. What the respondents have done is to exhibit bank statements to show that the first petitioner had also banked in cheques due to the first respondent and into his own account. I have already dealt with this issue earlier and on the basis that two wrongs do not make a right and on the basis that the respondents have clearly been shown to have used funds for their own benefit and since allegations have been made that even the first petitioner has done the same, all the more imperative it is for this court to act immediately to appoint a receiver and manager. As to the argument of the respondents that by proceeding with this petition, the petitioners are circumventing the order of Court No 1, I do not agree. The order, according to the notes of evidence exhibited, was made on 6 November 2002. As I have pointed out there is no evidence of the respondents having complied with this order. For one year to date, the respondents have been benefiting, to the detriment of the petitioners. This court's order will only complement the order of Court No 1 since the receiver and manager who will take over will comply with the order of Court No 1 by making all due payments. I therefore see no conflict between the orders of both these courts.

[80] Even assuming that this was the modus operandi of the directors namely to make payments for their personal use, then by depriving the petitioners from equally benefiting of such use, the respondents have shown bias and unfair treatment. If only the respondents had equally made payments to the petitioners their respective salaries and other emoluments there would have been no need for this court to appoint a receiver and manager.

[81] Having read the volumes of affidavits and repeated submission of both counsel, I find that there are more than 250 transactions from August to December 2002 in a secret Malayan Banking Bhd account opened by the respondents. There has been no explanation tendered as to who paid in those cheques and how the monies have been utilized. Further no receipts or documents have been tendered to back up each and every deposit or withdrawal. Till to date the respondents have not been able to show who the creditors of the first respondent are, to whom payments had been made from the secret account held at the Malayan Banking Bhd account and from the other individual accounts held by the second, third and fifth respondents.

[82] To my mind, a court appointed receiver and manager will be able to investigate and report as to how much monies have been received and whether they were utilized in good faith. The petitioners have shows that from the secret account number 50709-5131331 held in the name of the first respondent, a sum of RM430/713.44 has been debited. The petitioners

say that the first respondent has not explained where this money has gone to. Surely the receiver and manager would be the best person to trace this sum.

Petitioners refusing to sign cheques

[83] The respondents submitted that the petitioners refused to co-operate by signing cheques pursuant to the interim order of Court 1 in 'the suit'. However by their solicitors' letter dated 29 August 2002, the petitioners had confirmed returning 56 cheques duly signed including one for RM72,000 payable to the Director General of Inland Revenue. The petitioners did the same on 16 September 2002, 23 September 2002, 24 September 2002 and 25 September 2002. However by their solicitors' letter dated 19 September 2002, the petitioners refused to sign cheques made payable to Public Finance Bhd in settlement of the respondents' car instalment payments because the respondents refused to issue cheques for payment of the petitioners' car instalments. The utter frustrations of the petitioners are best reflected by quoting paragraphs from their solicitors letter dated 15 October 2000:

(iv) Our clients deny your clients' allegations in paragraph 4 of page 1 of your said letter and state that it is your clients who have made things difficult by submitting payments at the last minute and by being uncooperative such as refusing to sign the cheques first etc and have failed to perform their part promptly. Since your clients 'assume' administration of the Family Company by abusing their so-called 'majority power', they have been practising selective payments at their whims and fancies and our clients have been tolerating your clients. Your clients have deliberately sat on payments for repairs to company vehicles used by our clients, stationeries ordered by our clients for the use of the Family Company, refund in the sum of RM2,569 to Oon Jiun Huah being the first hire purchase instalment for the Family Company's vehicle used by him which he had advanced payment using his own monies to avoid being in arrears etc. A list of such payments together with copies of the bills for a total sum of RM7,558.21 which your clients are withholding to further oppress our clients are enclosed herewith.

(v) what your clients want is smooth payments for the benefit and convenience of your clients and completely ignoring all payments which will allow our clients to carry out their duties in the Family Company ,

(vi) In respect of the hire purchase payments, it is your clients who started the problem by deliberately refusing to prepare payments for all vehicles used by our clients except for one or two payments which your clients select at their whims and fancies whereas payments for all of the vehicles used by your clients are promptly prepared. The same goes for house instalments and insurance premium. In any event our clients believed that your clients have been using monies collected from the Family Company's customers to pay for your clients hire purchase instalments and other payments to your clients' benefit. Our clients seek explanation of all monies utilised by your clients which are still continuing till now and will bring it to the attention of the Court.

(vii) In future our clients will sign all cheques for payment of your clients' hire purchase, repairs etc and deposit them with us with the instructions to only forward the same to you for your onwards transmission to your clients after

A all cheques for payment of our clients' hire purchase, repairs, etc which have been duly signed by your clients are forwarded to us. To avoid any mix-up or confusion during the exchange of cheques, please request your clients to prepare separate list for your clients' payments and our clients' payments in respect of hire purchase, repairs, etc.

B **[84]** It is the petitioners' case that because they queried the respondents and refused to sign the cheques since respondents refused to make payments due in respect of the petitioners' claims, the respondents resorted to opening the secret bank account earlier referred to, into which cash and cash cheques received fom customers of the first respondent were banked into and from which secret account the respondents issued out the various cheques in C settlement thus avoiding the need to obtain the petitioners' co-signatures. It was because of the respondents' refusal to pay the second petitioner's car instalment for the purchase of a Toyota motorcar that the supporting creditors attended court to register their claim for RM101,000. This was confirmed by counsel representing the supporting creditors. Once the petitioners found out about the secret account, this was another reason they said why they D refused to sign cheques forwarded by the respondents.

[85] It is the case of the petitioners that the interim order of Court 1 in 'the suit' has become a dead letter as it was being effectually circumvented by the respondents. The petitioners being guarantors felt that by further signing E cheques, they were merely increasing their own vulnerability and liability by continuing to provide banking facilities for the use of the first respondent.

[86] As for the allegation that the petitioners were not paid because they did not attend work, the petitioners rebutted by contending that they were constantly being harassed with their motor cars being inspected like common F thieves to see if they were taking away things in the car. They and their workers were assaulted and attacked with parangs and iron rods by the respondents' family members when the petitioners visited the factory. Besides the locks were changed to prevent the petitioners from entering their offices.

[87] At this point of Mr Khoo's submission, Dato' Rajasingam objected to G the reference to assaults on the basis that it was sub judice since criminal charges were pending against two of the Respondents. Mr Khoo's reply was that whilst there were pictures taken and exhibited there were also medical reports. A medical report from Hospital Lam Wah Ee on one Heng Hang Yang aged 53 showed that this worker of the Petitioners who went into the factory premises at the request of the first and second petitioners was assaulted on H the head as well as on his left and right knees. The right knee was fractured. His ruptured quadriceps tendon was surgically repaired. I overruled Dato' Rajasingam's objection. Parties are entitled to relate why they are afraid to go to work since the respondents themselves have raised the issue that the petitioners have not been paid because they have not gone to work.

I **[88]** The oppressive and terrifying conduct of the respondents smack of highhandedness and any objection to the petitioners referring to their police reports, photographs and medical reports cannot be sustained. In fact the

fifth petitioner has even lodged a police report because of a threat by the fifth respondent that he would use gangsters to settle with the fifth petitioner. He also had threatened that for RM5,000 he could have someone from Thailand settle the fifth petitioner. The fifth petitioner stated that he was compelled to lodge the report to protect himself.

[89] As for the allegation of the respondents that the petitioners had in fact consented to the misappropriation of the funds, because they themselves had adopted the same modus operandi, Mr Khoo denied this and pointed out that at a Board of Directors meeting on 11 January 2002 the petitioners had protested against the respondent's misappropriating cheques and cash which were in fact payments made by customers and to be put into the first respondent's account. Mr Khoo also pointed out that his clients never had a secret account as was being maintained by the respondents. A copy of the minutes of the said Board Meeting was exhibited. It is the petitioners' case that because of this open challenge by them at the Board Meeting, the elimination of the Petitioners from the Board slowly began with the removal of the third petitioner on 8 March 2002 as the cashier of the first respondent, a position bestowed on her by the Founder himself. The respondents' contention that she was removed because of conflict of interest cannot be true because the minutes of the Board meeting held on 8 March 2002 which removed her did not reflect this explanation at all. It would have been easy to have recorded this as a reason if that indeed was so. Clearly this reason now given is an afterthought. Further the conduct of the respondents baffles logic. On 2 May 2002 the respondents gave the third petitioner a letter of appreciation for her invaluable contributions towards the company for the past 30 over years. Even in this letter the reason for her removal had not been stated. In any case what the conflict of interest was, has not been stated. After all this is a family company with each member required to do his/her utmost for the company.

[90] As for the allegation of the respondents in encl 96 listing, out 75 items where the petitioners were alleged to have made cash withdrawals allegedly for their own use, the petitioners replied by way of encl 97 and gave specific explanations for each of the 75 allegations. Where a withdrawal has been attributed to petty cash, the petitioners have listed Annextures A and B, and have given detailed explanations. Whilst this court is not to act as a receiver and manager would, however this court can see that the petitioners have answered in substance the allegations of impropriety on their part whereas the respondents' conduct needs to be examined and verified by the receiver and manager.

Detailed letter from the petitioners dated 17 June 2002

[91] The petitioners directed their solicitors to send to each of the respondent a registered letter dated 17 June 2002 detailing the entire history and the cause of the problems (exh 'V' to the petition). It is surprising to note that the respondents did not formally deny or rebut the contents of this letter. It is clear from this that the Founder had, as detailed by me earlier,

A settled with his second wife and the children through her and had at all material times intended that the fortunes of the first respondent be acquired by his three sons namely the 1st and second petitioners and the third respondent and their respective families.

B **[92]** For more than 14 months, the petitioners have not been paid anything whilst the respondent's have had the best out of the family company. It is because of this act of imprudence and vindictiveness on the part of the respondents that the petitioners have been forced to file these winding up proceedings which provide for the immediate protection of the oppressed minority.

C **[93]** To my mind the appointment of the receiver and manager until the hearing of the winding up petition would enable all parties to receive their just dues as was intended by the Founder. The receiver and manager suggested by the petitioners namely Gan Ah Tee and Ooi Woon Chee are ably qualified for this job. They each have, in their consent letter to act, provided their D respective liquadator's licence. They belong to a company called KPMG Malaysia which is part of KMPG International, represented by more than 100,000 people in 152 countries. Amongst their expertise is fraud investigation which service applies to investigating, appraising and reporting on fraud and which includes analysis and interpretation of documents, reconstruction of fraud and other misconduct and identification of the persons involved and E also in preparing reports for court purposes with expert testimony. There was some feeble effort made to challenge these appointments. There was also a suggestion to appoint the local Government Liquidator.

[94] This court was indeed surprised at the suggestion to appoint the F Government Liquidator. From his daily appearances in court, this court can even take judicial notice that the Official Receiver Malaysia is so over-burdened that this matter which ought to be expedited with the utmost urgency would only receive divided attention if handled by the Official Receiver. If the respondents had any private appointees they could have provided this court with their names and details. Before me two names have been proposed. I have G no reason to doubt their expertise.

[95] To my mind, the appointment of a receiver and manager is unavoidable. There is a total break down in communication. Parties cannot see eye to eye and are at each other's throats, literally, what more with assaults and threats of engaging gangsters and Thai hit-men. The appointment of the receiver H and manager will allow for a cooling off period with neither party being able to make allegations against the other.

[96] I foresee a massive clean up task ahead for the receiver and manager and the opposing of this appointment is in my view ill-advised as both sides would not be able to help each other to clean up the company. The receiver I and manager would be able to tell the court how much profits were made, what the true expenses were, be able to trace all payments by customers, get feed back from customers regarding the volume of sales and when they were

asked to make payments and to whom payments were made and whether customers monies were paid into individual accounts of the petitioners or the respondents or other nominee companies. They can also make payments of all monies due, including any order for payment made by this court and thereafter after settlement of all arrears they can at their discretion make appropriate allowances to the petitioners and to the respondents.

[97] In this particular case I had given each party ample opportunities to reply and to further reply so that each party would be satisfied that every opportunity had been given for each party to present its case to the fullest.

[98] In this context I gave Ms Karin a further opportunity to reply. She took the issue that since the Petitioners have claimed that some of their shares are being held by the respondents in trust for them there therefore is a dispute as to the ownership of the shares and that since this is an issue before Court No 1 in 'the suit', the petitioners ought not to be allowed to proceed with this petition.

[99] The answer to this is very simple. The respondents had never denied that the petitioners are shareholders. It is the amount of shares held by them that is in dispute. Therefore since each of the petitioners herein is a shareholder although in sums not agreed to by the respondents, yet they are shareholders and entitled to proceed with the petition. Ms Karin relied on *Re JN2 Ltd* [1977] 3 All ER 1104 CD, where the court held that the court should not allow the petition of a contributory to remain on the file where his status as a contributory was bona fide in dispute since he should not be permitted to present a petition, and thereby interfere with the company's disposition of its assets, so long as his right to be a shareholder was in question. The court held that since there was a bona fide dispute in *Re JN 2 Ltd* as to whether any shares had been alloted to the petitioner, the petition would therefore be dismissed. However it is pertinent to also refer to an earlier finding which was not cited by counsel. The court also found that an allottee of shares was liable to contribute to the assets of a company in the event of its being wound up eventhough the allottee's name was not included in the register of members of the company. Accordingly an allottee who was not a registered shareholder was a contributory for the purposes of s 224(1) of the 1948 Act and was therefore entitled to present a winding up petition. In other words even an allottee who is not a registered shareholder is entitled to present the petition; what more in this case where the petitioners are already shareholders. In any case, the fifth and sixth petitioners are beneficiaries and have been benefiting previously. At most even if they are not registered shareholders they are beneficiaries of their grandfather's intention to benefit them since this is a family company. It is my judgment therefore that they are entitled to present a winding up petition.

[100] Finally Ms Karin argued that the said petition is a nullity for want of compliance with r 26 of the Companies (Winding Up) Rules 1972 ('the Rules') in that the affidavit sought to verify the petition is a petition fixed for hearing in a different court and on a different date. Enclosure 2 that is the petition

A is registered in Court 4 that is this court and the affidavit verifying the petition is registered in Court 2. The respondents therefore contended that the petition is a nullity as it is not verified by a proper affidavit. The first petitioner filed an affidavit (encl 41) in response to this. He averred that the petition was originally fixed for hearing on 19 August 2003 when the sealed copies were extracted from the court registry. However the petitioners applied for an B early date through a certificate of urgency. In the meantime in view of the need to comply with r 26 of the Rules which provides that an affidavit verifying petition must be filed within four days after the petition is presented, and as time was needed to make copies of the sealed petition (which could only be done after the sealed copies have been extracted from the court) together C with voluminous exhibits to be included in the affidavit verifying petition of which ten copies were needed so that there were sufficient copies for service on the respondents and the other parties and there being the need to number the documents and thereafter to send them for binding before the said affidavit verifying petition could be affirmed and filed in court within the prescribed time, the petitioners were forced to make copies of the petition D showing the original hearing date and to include the same in the affidavit verifying the petition. Thereafter the petitioners' application for an early hearing date was granted and the early hearing date was on 16 July 2003. Sealed copies of the petition were then returned to the Court for alteration of its hearing date to 16th July 2003 before the same was advertised and E served on the respondents. In any case, r 23(2) of the said Rules allows for the hearing date of the petition to be altered before the petition is advertised. It is the respondents' contention that since the date in the petition annexed to the affidavit bears the original hearing date namely 19 August 2003 and the petition served on them bore the date 16 July 2003 given because of the certificate of urgency, the petition is bad. In this context, it is appropriate to F refer to r 194(1) of the said Rules which reads as follows:

> No proceeding under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

G **[101]** This court has not been shown if the respondents had suffered any prejudice. What is of importance is that both the petition, the affidavit verifying petition and the petition annexed to the affidavit all bear the same petition number and that the two petitions are identical in content and in form. The courts have now taken the stand that mere technicalities should not H be used to stifle justice. Gone are the days when strict compliance with the letter of the law was required. If at all the objection is taken all that can happen is for the petition to be struck out and the petitioners could always refile. On the other hand, the complaint of the petitioners is that each day there is delay the respondents are siphoning funds from the first respondent. It is appropriate therefore for this court to find that there has been no I injustice to the respondents by the date not having been amended in the petition annexed to the affidavit verifying petition. As for the petition being filed in one court and the affidavit in another this is a mere administrative

mix-up. The petition was initially fixed for hearing in Court 2. However when the judge attached to Court 2 was directed by the Chief Judge to hear only criminal cases to clear the back-log of drug cases, this case was then redirected to this court. Considering the frivolity of the mistake if any in not altering the date before filing the affidavit verifying petition, this court is of the view that this is a classic case where r 194(1) of the said Rules must be invoked to see that technicalities do not thwart justice from prevailing.

[102] It is necessary to address the oft-raised argument of Ms Karin in this case that the petitioners ought to be precluded from proceeding with this application and the winding up petition after having filed a minority shareholders' action in Court 1 in the suit . The answer to this is to refer to the Privy Council decision in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227. The Privy Council held that relief could not be sought under s 181 of the Companies Act 1965 merely because facts were established which would found a minority shareholders' action. The section required 'oppression' or 'disregard' to be shown and these were not necessary elements in a minority shareholders' action. But however if a case of 'oppression' or 'disregard' were made out, the section would apply and *it was no answer to say that the relief* might also have been obtained in a minority shareholders' action (emphasis added). In fact the facts of *Re Kong Thai* Sawmill are also similar to the facts of the case before me. I accept and adopt the distillation of the principles in such an action as was held by Ramly J in *Dato' Low Mong Hua (in his personal capacity and as representative of the members of the Eng Bee Family) v Banting Hock Hin Estate Co Sdn Bhd & 8 Ors* [2003] 6 AMR 245. His Lordship said as follows at p 260:

> The general priciples applicable to cases under s 181 of the Companies Act 1965, based on authorities decided earlier, are as follows:
>
> (a) The petitioner must identify or prove 'oppression' or 'disregard' for the case to be brought within s 181(1)(a) of the Act; the mere fact that one or more of those managing the company possess a majority of the voting power, make policy or executive decisions with which the petitioner does not agree, is not enough (see *Re Kong Thai* Sawmill *(Miri)* Sdn Bhd [1978] 2 MLJ 227, PC — per Lord Wilberforce);
>
> (b) Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into oppressive rule of the minority, or in disregard of their interests, that the section can be invoked (see *Re Kong Thai Sawmill*);
>
> (c) There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of 'oppression' can be made. (see *Elder and others v Elder & Watson Ltd* [1952] SC 49 as cited in *Re Kong Thai Sawmill)*;
>
> *(d) 'Disregard' involves something more* than a failure to take account of the minority interests; there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure, (per Lord Clyde in *Thomson v Drysdale* [1925] SC 311 followed in *Re Kong Thai Sawmill*);

(e) Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority; either may be demonstrated by a course of conduct which in some identifiable respect or at an identifiable point in time, can be held to have crossed the line (see *Re Kong Thai Sawmill)* ;

(f) The court will not generally interfere in management decision of companies (see *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 (PC));

(g) The court recognizes that directors are often bound to make decisions over a wide range of practical considerations and their judgment in good faith is not open to review in the courts. In *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil CoNL* (1968) 121 CLR 483; the court held: Directors in whom are vested the right and the duty of deciding where the company's interest lie and how they are to be served may be concerned with a wide range of practical considerations, and their *judgment, if exercised in good faith* and not *for irrelevant purposes, is* not open to review in the court.

[103] As for the question relating to legitimate expectations, the best reference I find on this is from *Company Law* by Farrar (3rd Ed, 1991) at pp 464–465. The relevant passage which was also quoted by Ramly J in *Dato' Low Mong Hua* reads as follows:

> Obviously, the petition will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have been relatively substantial capital contributions to the company. Shareholders in such companies and *not for irrelevant purposes,* is not open to review in the court.

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[105] The callous conduct of the respondents in this case has failed the general principles test set out by Ramly J in the *Dato' Low Mong Hua* case.

[106] After I had heard repeated oral submissions,parties further insisted on providing this court with further lengthy written submissions. Having also read the said submissions, I am of the view that it is proper to grant the petitioners an order in terms of prayers 3, 8, 10 and 11. The petitioners will have the costs of this application.

Appointment of receiver and manager allowed and encl 11 dismissed.

Reported by Sally Kee Seok Meng